Rescue Package For Fundamental Rights: Comments by PÁL SONNEVEND

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The European Union could not be imagined without respect for fundamental rights by both the EU itself and its member states. It is certainly not possible to define the EU solely on the basis of this, but the respect for fundamental rights belongs to the very core of a European identity, without which no integration would be possible. At the same time, the EU needed 57 years after the establishment of the European Steel and Coal Community to have a legally binding written catalogue of fundamental rights having the rank of a constitutional instrument. No doubt, this hesitation was partly a result of fearing the extension of the powers of the EC and the EU. Yet it also rooted in the conviction that judicial enforcement is not the only way to ensure respect for our most fundamental values.

My remarks on the excellent and innovative proposal of Professor Bogdandy and his team depart from this conviction.

This starting point might be surprising from a scholar from a country – Hungary – with a heavy influence of German legal thinking and with strong traditions of constitutional adjudication. Our constitutional system has, since the collapse of the communist rule, traditionally been focused on the judicial enforcement of constitutional rules. The new Basic Law which entered into force 1 January 2012 did not change this, even if the competences of the Constitutional Court were truncated badly with regard to tax and budget matters. Against this background, one could expect that a Hungarian scholar would welcome a further legalisation of fundamental rights protection without reservations.

What is more, the constitution making majority of the present Hungarian government actually rattled the conviction of constitutional lawyers that there is a solid, in a sense absolute body of norms distant from everyday political life. The experience is that quick constitutional amendments in reaction to Constitutional Court judgements are not a taboo. This instability inevitably calls for more durable guarantees beyond the reach of any constitution making majority. Since abandoning European integration is not an option for any serious political actor in Hungary, one could reasonably argue that international law – like the European Convention on Human Rights – and the law of the European Union could fill the gap and serve as supplementary constitutions. The proposal of Professor Bogdandy and his team is pointing in this direction, and so I could not express anything but my instinctive sympathy for it.

Nevertheless there are a few questions that need be resolved before we yield to the tempting vision of an unlimited – yet minimum – protection by EU law against member state actions. The starting point is Article 51 (1) of the Charter of

Fundamental Rights of the European Union which subjects member states to the Charter only if they are implementing EU law. As the paper rightly points out, it is beyond doubt that this provision does not lead to a general obligation of member states to respect the Charter in all contexts. The basic question is therefore, what is the relationship between the Charter and the provision of Article 2 TEU which declares respect for human rights to be a foundational value of the EU common to the member states.

The paper suggests that the difference between the two is in the level of protection. Accordingly, the Charter contains the full *acquis* of EU fundamental rights, whereas Article 2 TEU aims at safeguarding essentials. The essence to be protected under Article 2 TEU should be identical to the essence of fundamental rights which is also protected by Article 52 (1) of the Charter and member states constitutions. This is the point, however, where the first question arises: if the Charter itself contains an essence guarantee – which it does in Article 52(1) – than this is also subject to the limitation of Article 51(1) of the Charter. In other words, member states are bound under Article 51(1) of the Charter to respect even the essence of fundamental rights only inasmuch they are implementing EU law. Assuming that Article 2 TEU does not lift the limitation of Article 51(1) of the Charter, it occurs therefore that the difference between the Charter on the one hand and Article 2 TEU on the other is not in the level, but in the nature of the protection. The Charter shall function as the foundation of judicial enforcement of fundamental rights, and Article 2 TEU is the basis of a political decision making under Article 7 TEU.

The paper attempts to eliminate this objection by referring to the fact that the values in Article 2 TEU are no longer removed from the jurisdiction of the CJEU, and therefore they are subjected to the Court's "mandate to ensure that "the law is observed". This is indeed a powerful argument as long as the CJEU elaborates on Article 2 TEU with regard to the European Union institutions. It is questionable, however, whether the language of Article 2 TEU according to which "these values are common to the Member States" creates a mandate for the CJEU to enforce such values against member states in light of the clear limitation of Article 51(1) of the Charter.

Finally, a reference to the practical value of the proposal is needed. The essence guarantee has a long tradition in German constitutional law and it is certainly a highly important cornerstone of a fundamental rights protection system. Nevertheless there seems to be consensus amongst German scholars that the essence of fundamental rights is close to impossible to define. Sources refer to the fact that there has been one single case in more than sixty years of the jurisprudence of the Bundesverfassungsgericht where the Court found a law to be in violation of the essence guarantee. This is naturally not a problem as long as the essence guarantee has a symbolic role expressing that certain values are beyond reach for the state. But it is extraordinarily difficult for a member state court to utilise – as the paper suggests – this test as the single tool under EU law in cases where Article 51(1) of the Charter prevents recourse to the full guarantees of the Charter. This difficulty seems to be even greater in countries where courts would actually need this tool because of highly problematic statutes: a political climate which allows the

adoption of such laws definitely requires clear cut and obvious tests so that the courts do not have to fear public criticism. Unfortunately, the essence guarantee does not seem to offer such a practical toolkit.

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